UNITED STATES SUPREME COURT

NUMBER 79-775

MACK W. FORD

RESPONDENT

AGAINST

ARVIS E. WHITMAN,
SHERIFF, BIENVILLE
PARISH

PETITIONER

APPLICATION FOR WRITS ON
BEHALF OF ARVIS E. WHITMAN,
SHERIFF, BIENVILLE PARISH

SUBMITTED BY:

BOBBY L. CULPEPPER
ATTORNEY AT LAW
P. O. DRAWER E
JONESBORO, LOUISIANA 71251
ATTORNEY FOR PETITIONER

I N D E X

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO._____

MACK W. FORD

RESPONDENT

against

ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH

PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, on rehearing, entered in the above case on September 12th, 1979.

OPINIONS BELOW

The original opinion of the United States District Court for the Western District of Louisiana was rendered under Docket Number 76-1210, with Reasons for Judgment being rendered orally on November 14th, 1977 and Judgment being rendered and filed on November 16th, 1977, a copy of said Judgment is attached hereto and made a part hereof and are appended to this petition in the Appendix at page numbers 1A, et seq. The original Judgment of the United States Court of Appeals for the Fifth Circuit is an unreported case, bearing docket numbers 77-3510 and 79-1006, summary calendar, a copy is attached hereto and appended to this petition in the Appendix, page 12A.

A petition for rehearing was filed timely before the United States Court of Appeals for the Fifth Circuit, said petition for rehearing being denied on September 12th, 1979, said rehearing having been filed in the United States Court of Appeals also on September 12th, 1979, a copy is attached hereto and appended to this petition in the Appendix, page 14A.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit, on rehearing, having been rendered on September 12th, 1979 and filed on said date, the jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1).

QUESTIONS PRESENTED

Three primary questions are presented to this Honorable Court for review and determination. It is submitted that the Honorable District Court below, as affirmed by the Honorable Fifth Circuit Court of Appeals erred in finding that there was a civil rights violation in this matter. It is respectfully submitted that the facts as presented by this case do not fall within the jurisdiction of 42 U.S.C. § 1983.

As such, petitioner herein seeks the review of the decision by the Honorable District Court, as affirmed by the Honorable Court of Appeals, below, in awarding $4,000.00 as damages plus attorneys fees and Court costs.

Lastly, a review of the decision to award punitive damages is sought.

It is submitted that the law of the State of Louisiana should have been applied insofar as a determination as to whether or not to award punitive damages, and that since such punitive damages may not be awarded under Louisiana Civil Code, Article 2315, the Honorable Courts below erred in awarding said punitive damages.

STATUTORY PROVISIONS

The instant case involves 42 U. S. Code § 1983, quoted below:

> "Section 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is respectfully submitted that Louisiana Civil Code, Article 2315 is also controlling, particularly insofar as the imposition of punitive damages is concerned. In pertinent part, Louisiana Civil Code, Article 2315 provides, as follows:

"Article 2315. Liability for Acts causing Damage; Survival of Action.

Article 2315. Every act whatsoever of man that causes damage to another obliges him by whose fault it happened to repair it.

* * * *

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

This is an action arising out of the Federal Civil Rights Act, 42 USCA 1983 and 1988, et seq., and is an action for punitive and compensatory damages.

It is uncontested that plaintiff was arrested on December 22, 1975 on charges of aggravated criminal damage to property. He posted bond and was released on that date. He was subsequently notified by members of the Bienville Parish Sheriff's Department to return to the Sheriff's Office for the purpose of posting new bond. On his arrival, plaintiff entered Sheriff Whitman's office. During the ensuing discussion, plaintiff was struck by the defendant, Whitman. As a result, plaintiff did incur some injuries.

After trial in the District Court, plaintiff was awarded the sum of $4,000.00 as punitive damages for violations of his civil rights. In addition, plaintiff was awarded attorney fees and court costs. On rehearing, petitioner's application was denied. Petitioner respectfully submits that there are substantial questions involved and writs of certiorari should be granted, to review the Judgment of the Honorable Fifth Circuit Court of Appeals, on rehearings, which affirmed the District Court below and Circuit Court on appeal.

SUMMARY OF THE ARGUMENT

I. IT IS PETITIONER, WHITMAN'S POSITION THAT THE HONORABLE COURTS BELOW ERRED IN FINDING THAT THERE WAS ANY CIVIL RIGHTS VIOLATION IN THIS MATTER.

It is respectfully submitted that a review of the evidence admitted in this case reveals that defendant, Whitman's actions were all performed in his personal capacity and had nothing to do with his position as Sheriff. It is respectfully submitted that defendant did not deprive plaintiff of any of his Constitutional rights under color of any statute.

Defendant Whitman met the plaintiff in the hall when plaintiff returned to make sufficient bond. At that time, defendant Whitman told plaintiff that he would like to discuss a personal matter in his office. After plaintiff and

defendant Whitman entered the Sheriff's Office, defendant questioned plaintiff in regard to some remarks plaintiff allegedly made regarding defendant Whitman and his wife. The essence of these remarks was that defendant Whitman was a "whoremonger" and that defendant Whitman and his wife were living together illegitimately. Defendant freely admitted that he was extremely angry and that he did use abusive language. Plaintiff made a statement which defendant Whitman interpreted as an admission that he had made such statement and defendant Whitman struck the plaintiff approximately three times. At trial, plaintiff did admit that he had probably told Andy Tolbert that the Sheriff was living with a woman to whom he was not married. Also, plaintiff clearly admitted that defendant Whitman

did make the statement that this was a personal matter. Also, plaintiff admitted that the Sheriff did not attempt to keep him in his office and that plaintiff did not attempt to leave.

As a result of the above, it is defendant Whitman's position that plaintiff was well aware that the entire incident was a personal matter and certainly plaintiff had no other impression and therefore there was no civil rights violation in this matter.

II. THE HONORABLE COURTS BELOW ERRED IN AWARDING DAMAGES TO PLAINTIFF IN THE AMOUNT OF $4,000.00 PLUS ATTORNEY'S FEES AND COURT COSTS.

From the entire evidence in this case, it is very clear that any physical damage plaintiff suffered was minimal at worse. The award of

$4,000.00 is an award for punitive damage and it is petitioner's position that an award in this amount was certainly inappropriate under the facts of this case.

III. THE HONORABLE COURTS BELOW ERRED IN AWARDING PUNITIVE DAMAGES UNDER THE CIRCUMSTANCES OF THIS CASE.

Considering the special factual circumstances of this case, it is petitioner Whitman's position that in the event that the Courts below found that there was some civil rights violation by the defendant, the facts of this case make the awarding of punitive damages inappropriate.

ARGUMENT AND LAW IN SUPPORT OF ALLOWANCE OF WRIT

I. THE COURTS BELOW ERRED IN FINDING THAT THERE WAS ANY CIVIL RIGHTS VIOLATION IN THIS MATTER.

As both plaintiff and defendant Whitman testified, it was made very plain to plaintiff that the matter was a personal one between plaintiff and defendant Whitman. Plaintiff himself admitted that defendant made this statement. Additionally, the matters discussed in the Sheriff's Office were clearly personal and did not relate to a public matter.

It is very clear that 42 USCS 1983 is limited and deals only with those deprivations or rights which are accomplished under color of law of any state or territory and does not reach

purely private conduct. District of Columbia vs. Carter, (1973), 409 U.S. 418, 34 L. Ed. 2d 613, 93 S.Ct. 602, rehearing denied, 410 U.S. 958, 35 L. Ed 2d 694, 93 S.Ct. 1411. It is defendant Whitman's position that the facts of this case clearly place this situation as a purely private conduct.

In this case, defendant Whitman did not arrest plaintiff and certainly had nothing to do with the charges lodged against him. Sheriff Whitman testified at page 80 of the record that he asked plaintiff to come into his private office; that he had a personal matter he would like to discuss with plaintiff. The Sheriff indicated that this was the first time he had seen plaintiff since the election. After plaintiff entered his office, defendant started questioning plaintiff in regard to some remarks

plaintiff had allegedly made in regard to defendant and his wife. These remarks in essence were to the effect that defendant was a "whoremonger" and that defendant and his wife were living together illegitimately. Plaintiff denied making such remarks, whereupon defendant phoned Andy Tolbert, to whom plaintiff had allegedly made such remarks.

After Mr. Tolbert arrived at the Sheriff's Office, plaintiff made a remark which defendant interpreted as an admission of guilt, whereupon Sheriff Whitman struck the plaintiff two to three times. As a result of this action, plaintiff suffered a nose bleed.

Plaintiff himself conceded at page 114 of the record that he probably had told Tolbert that the Sheriff was living with a woman with whom he was not

married, but did not recall saying that the Sheriff was a "whoremonger", but from the article which had been entered into evidence indicated that a person could insinuate that.

The plaintiff conceded that the Sheriff did not attempt to keep plaintiff in his office and plaintiff did not attempt to leave. Plaintiff did tell defendant that he was not there to fight him.

It is respectfully submitted that when all of the above circumstances are taken into consideration, it is very clear that defendant, Sheriff Whitman, did not act in his official capacity under color of state law and therefore cannot be found to have violated plaintiff's civil rights.

II. THE HONORABLE COURTS BELOW ERRED IN AWARDING DAMAGES TO PLAINTIFF IN THE AMOUNT OF $4,000.00, PLUS ATTORNEY'S FEES AND COURT COSTS.

In the Minute Entry on page 54, it is clearly indicated that the total damages awarded in the amount of $4,000.00 was punitive damages. It is respectfully submitted that the circumstances in this case certainly do not warrant such an award for damages.

Considering the admissions by plaintiff and the natural import such accusations by plaintiff would have upon an average person, it is respectfully submitted that the anger and subsequent actions taken by Sheriff Whitman were certainly understandable at least to some extent. In this case, certainly plaintiff cannot be considered to be blameless under the facts of this

case. Courts have previously implied in other cases that an infringement of personal liberty which results in only a short period of restraint or involves no physical injury may go in mitigation of damages. Pritchard vs. Perry (1975) 508 F. 2d 423.

It is respectfully submitted that the physical damage incurred by the plaintiff was clearly minimal and considering the provocation of defendant by plaintiff, certainly such an award is not warranted nor justified by evidence admitted at trial.

Additionally, it is counsel's position that consideration must be given to the actions which caused the alleged battery committed by Sheriff Whitman. This case is neither appropriate nor needful of the imposition of punitive damages in the

award given. As counsel for Ford specifically indicates, in Sullivan vs. Little Hunting Park, 396 U.S. 229, 90 S. Ct. 400, at 406 (1969), the Court noted that the rule is simply to apply both Federal and State rules on damages "whichever" better serves the policies expressed in the Federal Statutes". As counsel reads this rule, the application of the rule that punitive or exemplary damages may be imposed should hinge on the facts of the case. A careful review of this case, when viewed in light of the substantive Louisiana law, clearly indicates that while the Doctrine of Justification may not be present in this case, the "Doctrine of Mitigation of Damages" is in effect. As such, the Court would serve the best interest of the parties at interest in this case, together with

the substantive and procedural application of 42 U.S. Code, Section 1983, by disallowing the award of attorney's fees and costs in this matter.

Herein, state law should be looked to where justice would be served by disallowing the award of attorney's fees.

Our Louisiana Code, specifically Article 2315, may be reviewed in vain to find the imposition of attorney's fees in cases such as this.

Counsel would specifically refer Your Honors to Vincent vs. Morgan's Louisiana and T. R. and S. S. Company, 140 La. 1027, 74 So. 541 (1917). Therein, the Court clearly notes that in a civil action for personal injury arising from the fault of another, the law does not allow the increase of actual and compensatory damages by pecuniary

damages in the form of exemplary or punitive damages. It is counsel's position that a review of the federal cases which allow compensatory damages do not mandate them, but rather, simply allow them. See for example the case of Guzman vs. Western State Bank of Devil's Lake, 540 F. 2d 948 (8th Cir., 1976). It is counsel's position that the Honorable Trial Court below erred in applying punitive damages in the form of costs and attorney's fees.

As originally submitted in the original brief in this matter, it is respectfully submitted that the physical damage incurred by the plaintiff was clearly minimal and considering the provocation of defendant by plaintiff, an award of attorney's fees and costs, as punitive and exemplary damages, is not warranted nor justified by the evidence admitted at trial.

III. THE HONORABLE COURTS BELOW ERRED IN AWARDING PUNITIVE DAMAGES HEREIN.

While it is clear that punitive damages may, in appropriate cases, be awarded for violation of 42 U.S.C.S. 1983, even in absence of actual damages, it is respectfully submitted that the facts of this case do not warrant such punitive damages. Stolberg vs. Members of the Board of Trustees, 474 F. 2d 485.

It is respectfully submitted that this case is very similar to the facts in the case styled "James vs. Lusby" (1974), 499 F. 2d 488. In that case, it was uncontested that petitioner shouted obscenities at the policeman, and there was no clear evidence of abusive conduct by the arresting officer. Further, there was a failure of petitioner to mitigate the impact of the alleged wrongful acts and therefore

the Court found that punitive damages were inappropriate. It has been held in other cases that punitive damages are warranted in civil rights action only if there was a showing of bad faith of some indication of a deterrent impact. Caplin vs. Oak (1973) 356 F. Supp. 1250. In this case, there is certainly no indication that such an award would have a deterrent impact. Additionally, considering that the Sheriff clearly indicated that the matter was a personal one and that plaintiff acknowledged it as such, it is respectfully submitted that there is no showing of bad faith and therefore a punitive damage should not be awarded.

CONCLUSION AND PRAYER

Based upon the above facts and authorities, petitioner urges that the decisions of the Courts below in this matter are manifestly and clearly erroneous.

WHEREFORE, petitioner, SHERIFF ARVIS E. WHITMAN prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Further prays for all necessary orders and decrees and for just and equitable relief.

BOBBY L. CULPEPPER
ATTORNEY AT LAW
P. O. DRAWER E
JONESBORO, LOUISIANA 71251

BOBBY L. CULPEPPER

C E R T I F I C A T E

I hereby certify that a copy of the foregoing Application for Writs has been served upon Mack W. Ford by mailing a copy of same in the United States mail, postage prepaid, addressed to Mr. Dee D. Drell, Gravel, Roy & Burnes, Attorneys at Law, P. O. Box 1792, Alexandria, Louisiana 71301, and to defendant, Andy Tolbert, by mailing a copy of same to John B. Benton, Jr., P. O. Box 740, Minden, Louisiana 71055 and to other counsel, by mailing a copy of same to Mr. Alex F. Smith, Jr., Mayer, Smith & Roberts, Attorneys at Law, 307 Wall Street, Shreveport, Louisiana 71104.

Jonesboro, Louisiana this the 13 day of November, 1979.

BOBBY L. CULPEPPER

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

MACK W. FORD

VERSUS CIVIL ACTION NO. 76-1210

ARVIS E. WHITMAN

J U D G M E N T

This action having come on for trial before the Court, Honorable Tom Stagg, District Judge, presiding, and the issues having been duly tried and a decision having duly been rendered, and reasons given orally in Court:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Mack W. Ford, and against defendant, Arvis E. Whitman, in the amount of $4,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action be

taxed to the defendant, and that a reasonable attorney's fee be included as costs of the action, said fee to be determined by the Court at a later date.

DATED at Shreveport, Louisiana, this 16th day of November, 1977.

TOM STAGG
UNITED STATES DISTRICT JUDGE

ENTERED NOVEMBER 16, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 77-3510

MACK W. FORD
PLAINTIFF-APPELLEE,
CROSS APPELLANT,

VERSUS

ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH
DEFENDANT-APPELLANT,
CROSS-APPELLEE

Appeals from the United States District Court for the Western District of Louisiana

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion for remand of the record to the United States District Court for the Western District of Louisiana for a determination of attorney's fees is GRANTED.

MINUTE ENTRY

STAGG, J.

October 23rd, 1978

MACK W. FORD

VERSUS CIVIL ACTION #76-1210

ARVIS E. WHITMAN SHREVEPORT DIVISION

* * *

On November 14, 1977, the court rendered judgment in favor of plaintiff, Mack W. Ford and against defendant, Arvis E. Whitman, in the amount of $4,000. as punitive damages for a willful violation of the plaintiff's civil rights. The court also awarded a reasonable attorneys fee for plaintiff to be determined upon submission of an affidavit of counsel's time and expenses.

While some additional services were required between the filing of the affidavit and the appeal, counsel for plaintiff has informed the court that

they were not substantial and that no additional fee should be awarded. Accordingly, this award will encompass all work performed before this court.

Having reviewed the statement of time and expenses and the defendant's opposition, and taking into account the factors discussed in Johnson vs. Georgia Highway Express Co., 488 F. 2d 714 (5th Cir. 1974), particularly the customary fee in this area and the undesirability of this type of case, the court finds that a reasonable attorney's fee is $2,000. together with expenses of $600.26.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

MACK W. FORD

VERSUS CIVIL ACTION NO. 76-1210

ARVIS E. WHITMAN

J U D G M E N T

For the reasons assigned in the foregoing minute entry,

IT IS ORDERED that plaintiff, Mack W. Ford, recover from defendant, Arvis E. Whitman, the sum of TWO THOUSAND SIX HUNDRED AND 26/100 ($2,600.26) DOLLARS as a reasonable attorney's fee and expenses.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, this 23rd day of October, 1978.

TOM STAGG
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 77-3510 & 79-1006

SUMMARY CALENDAR*

MACK W. FORD Plaintiff-Appellee,
Cross Appellant,

VS.

ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH Defendant-Appellant,
Cross Appellee.

Appeals from the United States District Court for the Western District of Louisiana

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(AUGUST 14, 1979)

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, Et Al, 5 Cir., 1970, 431 F.2d 409, Part I.

In this case, tried to the District Judge without the intervention of a jury, Reverend Mack Ford was awarded damages against the Sheriff of Bienville Parish, Louisiana, in the sum of $4,000. for a physical assault committed by the Sheriff upon Ford in the Sheriff's Office on December 19, 1975. The undisputed evidence established that the Sheriff had caused Ford to be called back to the Sheriff's Office in the Courthouse, after hours, to furnish new bail in a case pending against Ford. He was called into the Sheriff's Office, where the Sheriff questioned Ford about some scandalous remarks which Ford had allegedly made about him and then struck him about the face and head at least three times.

On appeal, the Sheriff contends that this was a personal matter, not a violation of Ford's constitutional rights committed under color of state law.

Under the facts and circumstances here presented this contention is altogether untenable and the judgment of the District Court, including an award of punitive damages is summarily affirmed in keeping with the provisions of 42 U.S.C., §1983. See, in particular, Gore vs. Turner, 5 Cir., 1978, 563 F.2d 159; Jacobs vs. City of New Orleans, 5 Cir., 1973, 484 F.2d 24; Lee vs. Southern Home Sites Corporation, 5 Cir., 1970, 429 F. 2d 290.

We likewise affirm the judgment of the District Court awarding the prevailing plaintiff the sum of $2,600.26 attorney's fees and expenses, the Civil Rights Attorney's Fees Awards Act of 1976; Crowe vs. Lucas, 5 Cir., 1979, 595 F.2d 985; Morrow vs. Dillard, 5 Cir., 1978, 580 F. 2d 1284.

The case will be remanded to the District Court for the purpose of determining the amount of attorney's fees due for the defense of this appeal,

Claiborne vs. Illinois Central Railroad, 5 Cir., 1978, 583 F.2d 143.

Ford's cross appeal, alleging inadequacy of damages, is dismissed as untimely. See Rule 4(a), Federal Rules of Appellate Procedure. Appellee's cross appeal should have been filed no later than December 27, 1977, but was not filed until January 20, 1978.

In any event, had the cross appeal been timely filed, it would have been of no avail for the reason that the damages awarded by the Court were well within its discretion, considering the law and the evidence, and not subject to revision here on behalf of either the appellant or appellee.

On direct appeal, AFFIRMED, and REMANDED for the determination of appellate attorney's fees on appeal.

The cross appeal is DISMISSED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 77-3510
79-1006
SUMMARY CALENDAR

D. C. DOCKET NO. CA-76-1210

MACK W. FORD	Plaintiff-Appellee, Cross-Appellant
VERSUS	
ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH	Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Western District of Louisiana

Before COLEMAN, FAY and RUBIN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was

taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court; the cross appeal is dismissed;

It is further ordered that the defendant-appellant pay to the plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 14, 1979

ISSUED AS MANDATE: SEP. 20, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-3510

MACK W. FORD	Plaintiff-Appellee, Cross-Appellant,
VERSUS	
ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH	Defendant-Appellant, Cross-Appellee.

* * * * * * * * * * *

NO. 79-1006

MACK W. FORD	Plaintiff-Appellee
VERSUS	
ARVIS E. WHITMAN, SHERIFF OF BIENVILLE PARISH	Defendant-Appellant.

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Appeals from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(SEPTEMBER 12, 1979)

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

RESPECTFULLY SUBMITTED,

BOBBY L. CULPEPPER
ATTORNEY AT LAW
P. O. DRAWER E
JONESBORO, LOUISIANA 71251

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-775

ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH,

Applicant

versus

MACK W. FORD,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI REQUESTED BY APPLICANT

GRAVEL, ROY & BURNES
DEE D. DRELL
711 Washington Street
Post Office Box 1792
Alexandria, LA 71301
(318) 487-4501

Attorney for Mack Ford,
Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-775

ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH,

Applicant

versus

MACK W. FORD,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI REQUESTED BY APPLICANT

GRAVEL, ROY & BURNES
DEE D. DRELL
711 Washington Street
Post Office Box 1792
Alexandria, LA 71301
(318) 487-4501

Attorney for Mack Ford,
Respondent

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STATUTES

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-775

ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH,

Applicant

v.

MACK W. FORD,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI REQUESTED BY APPLICANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed error in finding a violation of the Civil Rights Acts, and specifically 42 U.S.C.A. §1983, et seq.

2. Whether the District Court erred in awarding damages, punitive or otherwise, plus attorneys fees and court costs.

STATEMENT OF THE CASE

This action was a suit for punitive

and compensatory damages, plus attorneys fees, for violations of plaintiff-respondent's civil rights on December 22, 1975, arising specifically from a beating suffered by plaintiff-respondent at the hands of defendant-applicant in his capacity as Sheriff of Bienville Parish, Louisiana. Suit was filed on November 11, 1976, and plaintiff's complaint was allowed amended on September 12, 1977, to conform to the evidence and to pray for attorneys fees as part of the costs of the action. After normal, appropriate, pre-trial proceedings, trial was held before the Honorable Tom Stagg, District Judge, on November 14, 1977. After hearing the evidence, and after giving oral reasons therefor, Judge Stagg found for plaintiff, Reverend Mack Ford, and against Arvis Whitman, awarding $4,000.00 as damages plus a reasonable attorneys fee and all costs. On October 23, 1978, Judge Stagg fixed the award of attorneys fees at $2,000.00 plus expenses of $600.26. An appeal ensued, and by opinion dated August 14, 1979, the trial court's decision was affirmed.

As noted in the application of Whitman, there is agreement as to plaintiff's arrest on December 22, 1975, his release on bond his return to the Sheriff's office as directed by members of the Sheriff's department, and the beating which plaintiff suffered in the Sheriff's office. The sole factual issue before this court relating to liability is that of whether the beating administered by Whitman was a mere personal matter or whether it was done under color of

law, and, therefore, whether the damages awarded were proper under these circumstances.

SUMMARY OF THE ARGUMENT

1. As to Whitman's assertion that the beating was a personal matter and not under color of law, respondent, Ford, shows that applicant's assertions in this regard are in error and are in conflict with classic and well-settled areas of civil rights law. Analyzing the facts, and findings as made by the District Judge, it is clear that the "color of law" requirements are met in the case at bar.

2. As to Whitman's assertion that the District Judge erred in awarding punitive damages to Mack Ford, this, too, is in error and in clear conflict with settled law.

3. As to Whitman's assertion that punitive damages were not appropriate on the facts of this case, respondent suggests that if, indeed, this case is an inappropriate one for an award of punitive damages, then, indeed, the intent and spirit of the Civil Rights Acts are violated. It is suggested that applicant's argument here, too, flies in the face of established and settled jurisprudence.

ARGUMENT

I. "COLOR OF LAW" AND LIABILITY

At the outset, respondent suggests that the briefness of the text of applicant's application in this court points to the overall weakness of his arguments in the case at bar. Applicant has sought to allege throughout this matter, and even in the trial court, that the events between Ford and Whitman on December 22, 1975, were merely personal. On this basis, Whitman seeks to slip out from under the umbrella of protection provided for Reverend Ford by way of the Civil Rights Acts, and particularly 42 U.S.C.A. §1983. Yet this logic and its after-the-fact assertion flies directly in the face of the overwhelming weight of evidence presented at trial. Respondent, Ford, concedes that the ambit of protection in the Civil Rights Acts does not apply to everyone, but rather only applies to those acting "under color of law". Applicant, in citing the Carter case (Application, p.16) suggests that, indeed, purely private conduct is outside of the protection. As a point of law this is generally correct. However, it is to be pointed out that the Carter case stated this only in dicta since the principal issue there was whether §1983 applied as to the District of Columbia. This Honorable Court does note in the opinion that generally the "Fourteenth Amendment itself erects no shield against merely private conduct however discriminatory or wrongful," District of Columbia v. Carter, 409 U.S.

418 at 423, 93 S.Ct. 602 at 606, 34 L. Ed.2d 613 (1973). Likewise, the court concludes, §1983 is limited in a similar fashion. In discussing the Fourteenth Amendment limitations, the court cites prior actions, (93 S.Ct. at 606, herein omitted) which discuss the nature of private conduct which has been deemed to be outside of the Amendment's protection. Yet even a cursory analysis of the Carter case and the cases cited therein reflects no factual situation similar to the case at bar. Where, in the cases cited in Carter, no liability (or Civil Rights jurisdiction) was found, the persons involved were indeed private individuals, and not, as here, public officials acting within the confines and scope of their offices.

In effect, then, applicant, Whitman, without saying so, has sought to allege that Sheriff Whitman did not act under color of law as he abused Reverend Ford. As summarized by the Seventh Circuit in Roberts v. Acres, 495 F.2d 57 (7th Cir., 1974), the "color of law" requirements of the Civil Rights Acts are as follows:

> [F]or an individual's conduct is engaged in under color of state law if clothed with the authority of the state and purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. (Citing Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.

Ed.2d 492 (1960); Screws v. United States, 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 49 (1946).

Put another way:

> [M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law. Monroe v. Pape, 365 U.S. at 184, 81 S.Ct. at 482; see also Baldwin v. Morgan, 251 F.2d 780 (5th Cir., 1958).

Analyzing the facts of the case at bar, as elicited during trial, the following indicia make it clear that, indeed, Sheriff Whitman acted "under color of" state law when he struck Reverend Ford. [The following references are to pagination in the appendix]. At App. 78, on cross-examination Sheriff Whitman admitted that, on the evening in question, he was in his office at the Bienville Parish, Louisiana, Courthouse. He was in his sheriff's uniform. He personally took the action to have Reverend Ford recalled to the courthouse for a bond fixing. He met Reverend Ford in the hallway (App. 79) and told (App. 81) Reverend Ford to enter the Sheriff's private office. Acceding to the Sheriff's recognized and ostensible authority, Reverend Ford did so. (App. 81, 97). At this

point, it is important to note that the sole reason Sheriff Whitman gave at trial for needing to see Reverend Ford was his anger over a comment allegedly made to ex-defendant Andy Tolbert during Sheriff Whitman's prior election campaign. In fact, the evidence reflects that Reverend Ford was a supporter of Sheriff Whitman's opponent in that election. (App. 81-83, 99). Once again, Reverend Ford admitted at trial that he had opposed Sheriff Whitman in that election and, more importantly, that at least in part his opposition was based upon his belief in certain misconduct of Sheriff Whitman's. (App. 102). Reverend Ford did not resist (App. 90) but, rather, showed the respect he should show for authority (App. 104-105). Finally, Reverend Ford confirmed that he considered the matter official because of the incidents of Sheriff Whitman's office as seen through Reverend Ford's eyes on that night (App. 130-131). Rhetorically it may be added, "Need more be said?"

Yet, despite all of these strengths, Sheriff Whitman still seeks to find sanctuary in his allegation of "purely private" conduct. It is respectfully submitted that, in view of Sheriff Whitman's admitted and ostensible official conduct, he clearly acted under color of state law as he maliciously and deliberately struck Reverend Ford. His conduct indeed borders on attempted intimidation since the brunt of Sheriff Whitman's objections on that night were aimed at the cessation of what must be considered as fair political

comment made during an election campaign. In this regard, Exhibit P-1 is important because it provides the basis--a fair basis--for that political comment in the public arena. So, too, in this case is the necessity for protection of open ideas and free speech to be protected within the ambit of Federal Civil Rights. See New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

As amply set forth in Monroe v. Pape, supra, the federal courts sit as a watchdog over the civil rights of individuals at the hands of state officials. His Honor, Judge Stagg, affirmed that principle in his reasons for judgment. He made specific factual findings and found sufficient indicia in the evidence to conclude that Sheriff Whitman acted under color of state law. When all of the foregoing argument is analyzed, only one simple phrase can properly sum up the conclusions he reached and the judgment he rendered--he was right.

II. DAMAGES

Although broken down into sub-issues, the issues relating to damages may be properly treated together for purposes of argument.

Applicant, Whitman, in brief, sets forth his third issue as "The District Court erred in awarding what amounts to punitive damages." Yet, in argument at p.24, applicant concedes that punitive

damages may indeed be awarded in appropriate cases.

Even a most cursory review of the Federal jurisprudence can leave no doubt that, indeed, both compensatory and punitive damages are recoverable under the Civil Rights Acts of 1871 and, particularly, under 42 U.S.C., Sections 1981, 1982, 1983 and 1988. Nevertheless, applicant's position is that punitive damages would not be allowable in this case even if his liability under the Civil Rights Acts were established at trial. It must be surmised that the only possible basis for defendant's position is in the old adage that punitive or exemplary damages are not allowed in Louisiana in civil cases. See, for example, Baggett v. Richardson, 473 F.2d 863 (5th Cir., 1973). But compare Loeblich v. Garnier, 113 So.2d 95 (La. App. 1st Cir., 1959) at 103. It is particularly interesting that applicant cites to this court a case dating from 1917 to support his position, thus ignoring a quite large expansion of the jurisprudence since that time! See Fagot v. Ciravola, 445 F.Supp. 342 (E.D. LA 1978). (Allowing of punitive damages against a defendant police department in Louisiana.) Applicant unfortunately overlooks a uniform federal interpretation which has been given to the Civil Rights Acts at issue in this case.

In Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), Justice Brennan well stated in his concurring opinion the scope of protection

provided by 42 U.S.C. §1983 as follows:

> Section 1983 in effect authorizes the federal courts to protect rights 'secured by the Constitution and laws' by invoking any of the remedies known to the arsenal of the law. Standards governing the granting of relief under §1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law (citations omitted). Of course, where justice requires it, federal district courts are duty-bound to enrich the jurisprudence of §1983 by looking to the remedies provided by the States wherein they sit. 42 U.S.C. §1983. But resort to state law as such should be had only in cases where for some reason federal remedial law is not and cannot be made adequate to carry out the purposes of the statute. 398 U.S. at 231, 90 S.Ct. at 1641.

Likewise, the United States Fifth Circuit Court of Appeals has succinctly stated:

> It [42 U.S.C. §1983] also permits damages including punitive damages, Mansell v. Saunders, 372 F.2d 573 (5th Cir., 1967) at 576.

Compare Silver v. Cormier, 529 F.2d 161 (10th Cir., 1976) at 163 and cases cited therein.

And, finally, combining §1983 with §1988 of the same title, the rule is to simply apply both federal and state rules on damages, "whichever better served the policies expressed in the federal statutues," Sullivan v. Little Hunting Park, 396 U.S. 229 at 240, 90 S.Ct. 400 at 406, 24 L. Ed.2d 325 (1969). Sullivan further provides that the rule of damages, including compensatory damages, regardless of source, is a federal rule to respond to the need when a federal rule is impaired. Even in the decisional law in the courts of the United States in Louisiana this is now clear (Fagot v. Ciravola, supra). It is suggested that in this case as well, the federal rule of punitive damages was properly invoked to protect those rights of respondent intended to be protected through the very existence of the Civil Rights Acts.

Assuming, therefore, that punitive damages are authorized in a §1983 action generally (and in Louisiana), some attention to the application of the rules of damages generally is in order. At the outset,

> Compensatory damages awardable in a §1983 case are not limited

> to the out-of-the-pocket pecuniary loss the plaintiffs suffered. They can be awarded for emotional and mental distress even though no actual damages are proven. (citations omitted) Punitive damages may also be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff (citations omitted), Guzman v. Western State Bank of Devils Lake, 540 F.2d 948 (8th Cir., 1976) at 953.

Returning once again to Justice Brennan in Adickes,

> [To recover punitive damages], it is sufficient for the plaintiff to show either that the defendant acted 'under color of [a] statute, ordinance, regulation, custom or usage of any State or Territory', with actual knowledge that he was violating a right 'secured by the Constitution and laws' or that the defendant acted with reckless disregard of whether he was thus violating such a right, 398 U.S. at 233, 90 S.Ct. at 1642.

In the same vein of jealously protecting the federally created rights involved in civil rights actions, federal law is deemed to permit an award of punitive damages even though there is an absence of actual loss to the plaintiff, Spence v. Staras, 507 F.2d 554 (7th Cir., 1974) at 558. Finally, as stated in Lee v. Southern Home Sites Corporation, 429 F.2d 290 (5th Cir., 1970), and reiterated in Gill v. Manuel, 488 F.2d 799 (9th Cir., 1973) at 801:

> The allowance of such damages [referring to punitive damages] inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent.

Given the language and policies set forth in Lee v. Southern Home Sites Corporation, supra, it is respectfully submitted that, indeed, this case was an appropriate case for both compensatory and punitive damages. Analyzing the facts in the Lee fashion, it can easily be concluded that because of Sheriff Whitman's obvious deliberate, wanton and malicious conduct, pecuniary punishment may be wise. Or, it may be also easily said that some form of deterrent was deemed necessary by the trial court. To repeat, it is for these very reasons that the court said in Lee:

> Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of fact. 429 F.2d at 294.

Further, in his arguments on damages, applicant seeks to show that Reverend Ford and not Sheriff Whitman was the offending party! In view of the suggestions made herein (supra) that Reverend Ford's comments made several months earlier, during a political campaign clearly constitute fair political commentary, applicant's allegations will not be further addressed except as to authorities cited by him.

Pritchard v. Perry, 508 F.2d 423 (4th Cir., 1975) cited by applicant does state, in dicta, the proposition for which the case was cited by applicant. However, applicant fails to point out the distinguishing language of the same paragraph, 508 F.2d at 426:

> But an individual, not under the disability of prison confinement, on the contrary, has an 'incontrovertible' right--a right always 'of constitutional dimensions' to be free from unreasonable interference by police officers and to enjoy 'security from arbitrary intrusion by the police.'

The proposed application of Pritchard suggested by applicant is inaccurate since Pritchard was not a case dealing with an award after trial on the merits but rather was a decision reversing a dismissal of the action for lack of a cognizable action under the Civil Rights Acts.

Likewise, Stolberg v. Members of the Board of Trustees for State Colleges of Connecticut, 474 F.2d 485 (2d Cir., 1973) does not support applicant's position. There, a professor was discharged for the exercise of protected First Amendment rights. Suit followed, but at trial, the district judge found specifically that the professor did not sustain any evidence of pain and suffering or damage to reputation. Likewise, for policy reasons, (474 F.2d at 489), the trial judge did not believe punitive damages were necessary to secure compliance with constitutional requirements and such an award might even have been detrimental to the public. Thus, in fact, the Stolberg case merely is another circuit's reaching the same conclusion reiterated, supra, in Lee. That is, where there is support in the record for a trial judge's discretion, it will not be disturbed on appeal. cf. Stolberg, 474 F.2d at 489.

James v. Lusby, 499 F.2d 488 (D.C. Cir., 1974) is entirely distinguishable from the facts at bar. There is no evidence that Reverend Ford did anything outside of the range of proper conduct. He shouted no

obscenities at the Sheriff and, by the Sheriff's own admission, he did not resist applicant's attack.

Finally, applicant cites Caplin v. Oak, 356 F.Supp. 1250 (S.D. N.Y. 1973). Since the case involved a situation involving the outright dismissal of plaintiff's complaint, the language of the case stands only for the proposition that there must be some showing of bad faith or indication of deterrent impact to warrant punitive damages. Here, unlike in Caplin, the District Judge made specific findings in his oral reasons for judgment (App. 199-201) which point clearly to his reasons for granting the damages stated herein, and which constitute an adequate and viable evidentiary basis for the trial court's decision. His discretion, having been soundly and wisely exercised, should not be disturbed.

Because of what respondent believes is a clear case of liability, it is respectfully submitted that, at the conclusion hereof, respondent is entitled to a further reasonable award of attorneys fees encompassing work in conjunction with Whitman's writ application, and, pursuant thereto, this Honorable Court should remand this cause for purposes of fixing said additional fees.

CONCLUSION

For the foregoing reasons, it is

respectfully submitted that the decision of the District Court as affirmed should be affirmed insofar as that decision awards damages, costs and attorneys fees, and included should be an additional reasonable award of attorneys fees encompassing work in conjunction with this writ application, and further this Court should remand this cause for purposes of fixing said additional fees.

Respectfully submitted,

GRAVEL, ROY & BURNES
BY: Dee D. Drell
DEE D. DRELL
Attorneys for
Respondent

CERTIFICATE OF SERVICE

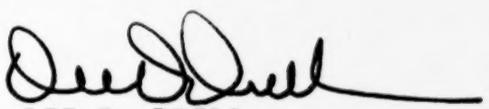
I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon the following persons by placing a copy of same in the mail, postage prepaid:

Mr. Bobby L. Culpepper
Attorney at Law
Post Office Drawer E
Jonesboro, LA 71251

Mr. John B. Benton, Jr.
Attorney at Law
Post Office Box 70
Minden, LA 71055

Mr. Alex F. Smith, Jr.
Attorney at Law
307 Wall Street
Shreveport, LA 71104

Alexandria, Louisiana, this 31st day of January, 1980.



DEE D. DRELL